HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1494 OF 1988.

1. Jayant Kalyanji Ghelani ..Appellants.
2. Madhu Kalyanji Ghelani,
Both of Bombay Indian
Inhabitants being the erstwhile
Partnership Firm of M/s. Jayant
Traders since dissolves during
the existence carrying on business at
55/57, Champal Galli, Bombay 400 002. ..Appellants.

Versus.

M/s. Ilac Limited,
A Company registered udner the
Companies Act, 1956 having their
Office at Jamalchand Ahmedabad
and the Rigional Office at
6/8 Rajda Chawl, 2nd Old
Hanuman Corss Lane, Bombay 400 002. ..Respondent.

Shri. H.P. Harsana i/b M/s. Harshad & Co., for the appellants.

CORAM: S.B.MHASE,J.

DATE : AUGUST 3, 2006.

ORAL JUDGMENT

1. This first appeal is directed as against the decree passed in Summary Suit No. 538 of 1983 by the Bombay City Civil Court at Bombay on 1st October 1984 whereby the appellant was directed to pay an amount of Rs.18,000/- as per the summons for judgment no. 724 of 1983.

2. Summary Suit No. 538 of 1983 was filed by the respondent for recovery of an amount of Rs. 42,583.40 ps. with further interest at the rate of 20% per annum on 39,038.05 from the date of filing of the suit till payment and costs. In the said suit, summons for judgment bearing No. 724 of 1983 was issued by the respondent - plaintiff. It was opposed. Affidavit in reply was filed. City Civil Court Bombay by order dated 3.3.1984 granted leave to defend on the condition that the appellant shall deposit Rs.18,000/- within a period of eight weeks. Thereafter, since the appellant failed to deposit the said amount, as per the said order, the suit was decreed by order dated 1st October 1984. Thus, the summons for judgment no. 724 of 1983 in Summary Suit No. 538 of 1983 was confirmed. That order is under challenge before this Court in this First Appeal.

3. Respondent - original plaintiff though served is absent. Learned counsel for the appellant submitted that the leave granted by the City Civil Court on 3.3.1984 subject to condition of deposit of Rs.18,000/- was unjust and illegal, and more specifically in view of the judgment of the Apex Court in the matter of **M/s. Mechalec Engineers and Manufacturers v/s. M/s. Basic**

Equipment Corporation (AIR 1977 SC 577). He submitted that the said judgment of the Apex Court has laid down the principles to be followed while considering the question of granting leave to defend under Order-37 Rule-2 of the Code of Civil Procedure, 1908. He specifically states that this case falls under clause (b) of the principles as laid down in the said case, namely, "if the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and defendant is entitled to unconditional leave to defend."

4. Learned counsel appearing on behalf of the appellants pointed out that in fact four cheques were issued for the goods sold. Learned counsel further submitted that there was a failure to give total delivery and since the balance delivery was not given and the goods were not of the quality, the payment of the cheques was stopped. Therefore, there was triable issue. The bonafides of the appellant are reflected since he has delivered the cheques for amount. Therefore, learned counsel submitted that the conditional leave to defend which was granted by the City Civil Court was not in accordance with the above

referred Supreme Court decision. He submitted that leave to defend should have been granted unconditionally.

5. Except the above point no other point was argued before me.

6. On perusal of the order dated 3.3.1984, by which leave to defend was granted, it is revealed that the appellant - original defendant has raised a point in respect of the quality of goods. It is further reflected that the cheques were given, but they were stopped by the appellants subsequently. This shows that there was a genuine and bonafide dispute between the respondent -plaintiff and appellant herein. It is not a case where the appellant avoided to make payment. But the question is about the quality of goods delivered and to be delivered which was required to be adjudicated. Looking to the order it appears that there was a triable issue and the appellant was contesting the said issue fairly and bonafidely. Therefore, case falls under clause (b) of the principles as laid down by the Apex Court in the matter of **M/s. Mechalec Engineers and Manufacturers v/s. M/s. Basic Equipment Corporation (AIR 1977 SC 577).** Therefore, City Civil Court should

have granted unconditional leave to defend. Since the amount as directed while granting leave to defend, was not deposited, the suit was decreed. However, the exercise of power by the City Civil Court, in view of the above referred Apex Court judgment, is inappropriate. Thus, decree is required to be set aside and it is accordingly set aside. The decree passed by the City Civil Court, Bombay in Summary Suit No. 538 of 1983 dated 1st October 1984 is hereby quashed and set aside. Leave to defend granted on 3.3.1984 subject to deposit of Rs.18,000/- is hereby quashed and modified and, in stead, the defendant - appellant herein is permitted to defend the said suit unconditionally. In view of this order, the matter is remitted to the City Civil Court. The City Civil Court is further directed to dispose of the suit as expeditiously as possible and in any event within a period of six months from the date of receipt of order. The amount deposited in this Court be refunded to the appellant.

7. With these directions, Appeal stands disposed of.

(S.B.MHASE, J.)

:sac/2006/single.